

**In the High Court of New Zealand  
Auckland Registry**

**CIV2005-404-4495**

**Under Part I of the Judicature Amendment Act 1972**

**In the matter of an application for review**

between

**The New Zealand Recreational Fishing Council Inc and  
New Zealand Big Game Fishing Council Inc**

Plaintiffs

and

**Minister of Fisheries**

First Defendant

and

**The Chief Executive of the Ministry of Fisheries**

Second Defendant

and

**Sanford Limited, Sealord Group Limited, and  
Pelagic & Tuna New Zealand Limited**

Third Defendant

**Plaintiffs First Amended Statement of Claim**

**Dated this 22<sup>nd</sup> day of December 2005**



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## 1. The Parties

- 1.1 The plaintiffs are each a duly incorporated society under the Incorporated Societies Act 1908 and have a combined membership of approximately 300,000 fishers from throughout New Zealand.
- 1.2 The plaintiffs represent marine, and recreational fishing interests, both incorporated, and unincorporated in New Zealand.
- 1.3 The first defendant, one of Her Majesty's Minister's, is the Minister of Fisheries ("the Minister") pursuant to the Fisheries Act 1996.
- 1.4 The second respondent, Dr John Glaister, is the Chief Executive of the Ministry of Fisheries (the Ministry being referred to as "MFish"), with the powers, duties and functions of the Chief Executive pursuant to the Fisheries Act 1996.
- 1.5 The third respondent's are commercial fishers who have requested to be heard in the proceedings.

## 2. Terminology

- 2.1 This statement of claim uses the following terms:
  - a. "the Act" means the Fisheries Act 1996;
  - b. "IPP 2004" means the Setting of Sustainability and Other Management Controls for Kahawai Stocks to be Introduced into the QMS on 1 October 2004, Initial Position Paper dated 12 January 2004;
  - c. "FAP 2004" means the Setting of Sustainability and Other Management Controls for Kahawai Stocks to be Introduced into the QMS on 1 October 2004, Final Position Paper dated 29 June 2004;
  - d. "IPP 2005" means the Initial Position Paper entitled "Review of Sustainability Measures and Other Management Controls for Kahawai for the 2005-06 (1 October) Fishing Year";
  - e. "FAP 2005" means the Final Position Paper entitled "Review of Sustainability Measures and Other Management Controls for Kahawai for the 2005-06 (1 October) Fishing Year";
  - f. "MFish" or "the Ministry" means the Ministry of Fisheries;

- g. "MFish's 2004 advice" means their initial position paper dated 12 January 2004 and their final advice paper dated 29 June 2004;
- h. "MFish's 2005 advice" means their initial position paper dated 8 July 2005, and the final advice paper dated 14 September 2005";
- i. "the Minister" means the Minister of Fisheries;
- j. "the Minister's 2004 decisions" means the Minister of Fisheries decisions for kahawai stocks made on or about 5 July 2004, and as communicated to stakeholders by letter dated 10 August 2004 decisions and affecting the fishing year commencing 1 October 2004;
- k. "the Minister's 2005 decisions" means the Minister of Fisheries decisions for the kahawai stocks made on or about 28 September 2005, as communicated to stakeholders by letter dated 22 November 2005 and affecting the fishing year commencing 1 October 2005;
- l. When referred to jointly the Minister's 2004 decisions and the Minister's 2005 decisions are jointly referred to as "the Minister's 2004 and 2005 decisions".
- m. "MSY" means maximum sustainable yield;
- n. "NZBGFC" means the New Zealand Big Game Fishing Council Inc;
- o. "QMA" means quota management area;
- p. "RFC" means The New Zealand Recreational Fishing Council Inc;
- q. "TAC" means total allowable catch;
- r. "TACC" means total allowable commercial catch;
- s. "Non-commercial" means both recreational and customary fishing or fishers in New Zealand.

### 3. **General Allegations**

#### ***Background and Historical Factors***

- 3.1 Kahawai is one of only a few fish species which nominally have a majority allocation in favour of non-commercial fishers.
- 3.2 Prior to the development in or about the mid 1970s of the purse seine fishing method to target pelagic coastal fish species, especially tuna, the commercial fishing catch of kahawai in New Zealand coastal waters was low.
- 3.3 Commercial catch levels of kahawai rose dramatically subsequent to 1975 and peaked in or about 1990 due to use of the purse seine fishing method, and the effect of incentives for commercial fishers to build catch history prior to introduction of the kahawai species to the quota management system (QMS).
- 3.4 The effect of such a dramatic rise in the commercial catch levels of kahawai was particularly significant in the Hauraki Gulf and Bay of Plenty regions, parts of which subsequently became the Quota Management Area (QMA) known as KAH1.
- 3.5 As used in conjunction with modern vessels and aerial spotting, the purse seine fishing method is highly effective at targeting schools of pelagic fish (including kahawai).
- 3.6 The commercial purse seine fleet is based in the Bay of Plenty, located within KAH1. The largest amount of commercial fishing effort for kahawai occurs in KAH1 (which area includes the Bay of Plenty and the Hauraki Gulf).
- 3.7 KAH1 has the highest number of recreational/non-commercial fishers and includes the Hauraki Gulf Marine Park.
- 3.8 Before 1990/91 fishing season when commercial competitive catch limits on the purse seine catch were introduced, the purse seine fleet landed between 4300 and 9600 tonnes of kahawai per season, and a further unspecified tonnage of mixed fish which included kahawai.
- 3.9 Prior to August 2004 the existing controls on fishing of kahawai included:
  - a. Commercial catch limits (CCL's) were imposed on the purse seine catch since the 1990/91 fishing years (now repealed or revoked);
  - b. A limit on the issue of new commercial fishing permits by section 93 of the Act (now repealed);

- c. Limits on purse seine fishing by the Fisheries (Auckland and Kermadec Areas Amateur Fishing) Regulations 1986;
  - d. Set net mesh size restrictions for commercial and recreational fishers;
  - e. Limits on recreational fishing by regulations under the Act being the Fisheries (Auckland and Kermadec Areas Amateur Fishing) Regulations 1986, Fisheries (Central Area Amateur Fishing) Regulations 1986, Fisheries (Challenger Area Amateur Fishing) Regulations 1986, Fisheries (South-East Area Amateur Fishing) Regulations 1986, Fisheries (Southland and Sub-Antarctic Areas Amateur Fishing) Regulations 1991 which impose daily bag limit restrictions per fisher;
  - f. Controls on non-commercial customary fishing by the Fisheries (Kaimoana) Customary Fishing Regulations 1998, and the South Island Customary Fishing Regulations 1998.
- 3.10 Protection of the Hauraki Gulf Marine Park and its life supporting capacity is declared to be a matter of national importance by the Hauraki Gulf Marine Park Act 2000, the provisions of which apply to decisions by the Minister.
- 3.11 Kahawai species were not initially included in the QMS introduced in 1986 but were introduced to the QMS under the Act on 1 October 2003 by the Fisheries (Declaration of New Stocks Subject to the Quota Management System) Notice (No. 2) 2003.

***The Minister's 2004 Decisions***

- 3.12 On or about 5 July 2004, the Minister made statutory powers of decision under the Fisheries Act 1996 (the Act) for kahawai stocks by:
- a. Setting a total allowable catch ("TAC") for each quota management area;
  - b. Allowing for non-commercial interests in the kahawai stock in each quota management area. These interests are:
    - (i) Maori customary non-commercial fishing interests; and
    - (ii) Recreational interests;

- c. Allowing for other sources of fishing related mortality for each quota management area;
  - d. Setting deemed values for the kahawai species;
  - e. Setting a total allowable commercial catch (“TACC”) for commercial fishing sector for each quota management area (collectively referred to as “the Minister's 2004 decisions”).
- 3.13 The Minister's 2004 decisions as communicated to stakeholders by letter dated 10 August 2004 came into effect on 1 October 2004 and set an initial TAC and allowances for each of QMAs, being KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10.
- 3.14 The Minister's 2004 decisions have been implemented by the second respondent or the second respondent's agents *inter alia* by:
- a. Giving the required notices in the Gazette, namely, the Fisheries (Total Allowable Catch) Notice 2004 and the Fisheries (Total Allowable Commercial Catch) Notice 2004; and
  - b. Calculating provisional catch entitlements due to commercial fishers; and
  - c. Allocating individual transferable quota (ITQ) to commercial fishers based on provisional catch entitlements; and
  - d. Paying compensation to commercial fishers so entitled, pursuant to section 50G of the Act.

***MFish Advice Prior to Minister's 2004 decisions***

- 3.15 Prior to the Minister's 2004 decisions, MFish provided advice to the Minister concerning how the kahawai species might be managed within the QMS by an initial position paper (“IPP 2004”) dated 12 January 2004 and invited submissions thereon from fishing sector interests.
- 3.16 MFish received submissions and information from fishing sector interests on the IPP 2004 for the kahawai species.

**Particulars**

- a. The IPP 2004 attracted a large number of submissions, emails and petitions, details of which are set out on pp 49-51 of the final advice paper dated 29 June 2004 (“FAP 2004”).

- b. Each of the plaintiffs provided substantial submissions to MFish in response to the IPP 2004.

3.17 The IPP 2004 was followed by the FAP 2004 which gave the Ministry's final advice to the Minister prior to the Minister's 2004 decisions.

***Information Available to MFish and Minister Prior to the Minister's 2004 Decisions***

3.18 Prior to the Minister's 2004 decisions, MFish had available information relevant to the exercise by the Minister of the various statutory powers of decision required to be made in respect of each QMA in accordance with the purpose of the Act for the kahawai stocks that:

- a. The abundance and availability of kahawai has been reduced to the non-commercial fishing sector as a consequence of the rise in the purse seine catch and fishing down of the kahawai stock by commercial interests;
- b. Kahawai is sold by commercial fishers for low value end-use purposes (such as fish bait and pet food) with a commercial port price of around 50 cents per kilogram;
- c. Non-market valuation estimates gave a high relative value for the kahawai species to the non-commercial/ recreational fishing sector.
- d. A common measure of fishing success for non-commercial fishers is by reference to catch rate information per trip (or catch per unit of effort) on a daily basis, and fish size;
- e. Catch rates by non-commercial fishers of kahawai was known to be low, with some estimates of only 50% of target non-commercial fishers catching kahawai per trip (source: Bradford 1999. Comparison of Marine Recreational Fish Harvest Rates and Fish Size Distributions]).
- f. In the Hauraki Gulf, catch rates by non-commercial fishers of kahawai is especially low, and fish caught are predominately of a juvenile size, indicating a sustainability risk within KAH1.

3.19 MFish has a preferred policy position favouring the use of catch history for determining both TAC's and allocation of the TAC between the fishing sectors.

### Particulars

a. MFish's IPP 2004 stated *inter alia* that:

"21... In the absence of a stock assessment, the MFish preferred policy is to use current utilisation as a basis for determining both TACs and allocation..."

b. MFish's FAP 2004 stated *inter alia* that:

"152. The MFish preferred TAC options are to either base combined TACs on current utilisation or an arbitrary 15% reduction in recreational and commercial use of key kahawai stocks (KAH 1, KAH 2; KAH 3 and KAH 8)..."

"183. MFish has a policy preference in these circumstances for a claims based allocation and recommends that reductions in recreational and commercial utilisation occur in equal proportions..."

"325. ...MFish considers that catch history information is a more certain basis for considering allowances for non-commercial use and has a policy preference for its option. MFish supports a proportional reduction to recreational allowances and TACCs for the fishery if the lower TAC option is chosen."

3.20 MFish has a preferred policy for making proportional allocations of fishing entitlements between the non-commercial and commercial sector.

### Particulars

a. MFish's FAP 2004 stated *inter alia* that:

"153. MFish considers an alternative option to TACs based on current utilisation is to base them on a proportional reduction in utilisation..."

"183. MFish has a policy preference in these circumstances for a claims based allocation and recommends that reductions in recreational and commercial utilisation occur in equal proportions..."

"325. ...MFish considers that catch history information is a more certain basis for considering allowances for non-commercial use and has a policy preference for its option. MFish supports a proportional reduction to recreational allowances and TACCs for the fishery if the lower TAC option is chosen."

3.21 In both the IPP 2004 and the FAP 2004 for kahawai, MFish advised the Minister that:

a. Setting TACs and TACCs based on the current use of the kahawai fishery (or a proportion of that use) had the advantage of reflecting public policy and other decisions already made for the fishery and the current reliance on the kahawai fishery by each fishing sector.

b. Current use estimates of kahawai for both the commercial and non-commercial sector were the best available information upon



which to base decisions for TACs and TACCs in each kahawai stock.

- c. The TACs for the six QMAs should be allocated between the non-commercial and commercial sectors based on issuing tonnage allowances as a proportion of current fishing sector use estimates.

3.22 MFish did not have or use or refer to the best available information to advise the Minister on setting of target levels of TACs that would maintain kahawai stocks at or above a level that can produce MSY in each QMA with any certainty. The Minister's 2004 decisions acknowledged that "*it is unknown whether [kahawai] stocks are currently above or below the biomass that will support the maximum sustainable yield ( $B_{MSY}$ )*" (paragraph 5 Minister's 2004 decisions).

3.23 Following the IPP 2004, MFish revised the estimates of commercial and non-commercial catch history of kahawai. Both were increased and the national combined total of the non-commercial and commercial current catch exceeded MFish's initial best estimate of sustainable use (for a national kahawai stock).

3.24 In advising the Minister, the second respondent and/or officials of MFish responsible for the FAP 2004 failed or omitted to advise the Minister as to:

- a. the true nature and scope of non-commercial interests, including the social, cultural and economic effects of maintaining the present level of catch for the recreational sector; or
- b. the social, cultural and economic effects from a 15% reduction of the recreational allowances in the kahawai stocks; or
- c. the relevant historical factors relating to overfishing and stock depletion of the kahawai fishery generally and in particular QMAs specifically; or
- d. the need for the purposes of the Minister's 2004 decisions, particularly in relation to TACs, TACCs and allowances, to consider the information, evidence and submissions in respect of each of the six QMAs separately, particularly the area of KAH1; or

- e. the established MFish policy that in making decisions as to TACCs or allowances the effects of overfishing should be attributable to the stakeholder group responsible for the overfishing; or
- f. the need to consider in relation to KAH1 the statutory recognition of the Hauraki Gulf and its islands as matters of national significance; or
- g. the obligation of the Minister, in relation to KAH1, to have particular regard to the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000.

***MFish Advice to Minister for 2004 Decisions***

3.25 As a result of such revised estimates (as pleaded in paragraph 3.23), the FAP 2004 contained MFish's 2004 advice for two options for the setting of TACs and TACCs based on current fishing sector use in the kahawai fishery being to set TAC's in each stock at either:

- a. The level of the combined estimates of the current use by the recreational and commercial sectors; or
- b. An arbitrary 15% proportional reduction of the combined estimates of recreational and commercial use.

3.26 For the purposes of the Minister's 2004 decisions, the Minister adopted the second such option and in relation to quota management areas KAH1, KAH2, KAH3 and KAH8 determined to:

- a. Set TACs, TACCs, and non-commercial allowances at a 15% proportional reduction of the combined estimates of recreational and commercial current use;
- b. Allocate the TACs between the non-commercial and commercial sectors by issuing tonnage "allowances" at a 15% proportional reduction in estimates of recreational and commercial current use;
- c. Allocate the TACs to the customary sector by allocating a tonnage "allowance" as an estimate based on 25% of estimates of recreational current use.

### ***The Minister's 2004 Decision Letter***

- 3.27 The Minister's 2004 decisions are recorded in writing in a letter dated 10 August 2004 sent to all stakeholders interested in the kahawai fishery including the plaintiffs ("the Minister's 2004 decisions letter"). The letter from the Minister is relied upon as if the same were set out in extenso herein.
- 3.28 The Minister's 2004 decisions letter contains the following statements regarding certain relevant aspects of the Minister's 2004 decisions, namely:

#### **TAC**

19. ...I am not satisfied that setting TACs based on current utilisation in KAH 1, KAH 2, KAH 3 and KAH 8 appropriately mitigates the risk that abundance may have declined over time and further decline is possible at levels based on current catches. I consider that the TACs for these stocks should at least maintain and preferably provide for an increase in the kahawai biomass. I have therefore decided to set a TAC for kahawai in KAH 1, KAH 2 and KAH 8 that is 15% below revised estimates of current utilisation. TACs in other areas are to be based on conservatively derived, nominal values. TACs for all stocks are outlined in [Table 1](#). ...

#### **Allowances and TACCs**

21. There are a number of competing demands for the available yield from kahawai stocks. This was clearly apparent from submissions. I recognise that there will be socio-economic impacts from making allowances and setting TACCs. I have noted in particular the potential of catch reductions on commercial operations that rely on kahawai as an integral component of their annual catch mix. I have carefully considered these impacts in coming to a decision. I have examined options for increasing the value to society from allocation decisions. However, in the case of kahawai, given the uncertainty in the available information I believe that the information on current use provides the best basis for allocating between each interest group. Accordingly I have decided to set allowances and TACCs that reflect current use in the fishery, reduced proportionally to fit within the bounds of the TAC set to ensure sustainability. My decisions on allowances for kahawai are outlined in the Table 1 below.

**Table 1: TACs, allowances and TACCs for kahawai.**

<b>Stock</b>	<b>TAC</b>	<b>Customary Allowance</b>	<b>Recreational Allowance</b>	<b>TACC</b>	<b>Fishing related incidental mortality</b>
<b>KAH1</b>	3685	550	1865	1195	75
<b>KAH2</b>	1705	205	680	785	35

KAH3	1035	125	435	455	20
KAH4	16	1	5	10	0
KAH8	1155	125	425	580	25
KAH10	16	1	5	10	0

**3.29** In determining the non-commercial (recreational and customary Maori) allowances, the Minister did not set such allowances before or prior to setting the TACC for each kahawai stock in the relevant individual QMAs, that is to say for KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10.

**3.30** The Minister's 2004 decisions adopted MFish advice and were, in effect, decisions to base the management of the kahawai fishery under the Act (being decisions for TACs, TACCs and non-commercial allowances) on current fishing sector use estimates (or a proportion of that use) based on recent catch levels or estimates of recent catch levels.

**3.31** The Minister's 2004 decisions letter noted that in order to implement a 15% reduction upon estimates of current recreational use, a reduction in the daily bag limit per person was likely. Paragraph 22 of the Minister's 2004 decisions letter stated:

**Other Management Measures**

22. I note that setting an allowance for recreational fishing less than the current level of use will require adopting other management measures to achieve this. A reduction in the daily bag limit per person is the most likely outcome, however MFish will provide me with further advice following consultation with recreational fishing interests on how best to achieve the required restraint on recreational catches.

**Effects of the Minister's 2004 decisions**

**3.32** Given the availability to MFish and the second respondent of information concerning the history of the kahawai fishery (including established examples – particularly in KAH1 – of overfishing and stock depletion since the 1980s) prior to the introduction of kahawai to the QMS in 2003, and concerning the true nature and scope of non-commercial and recreational sector interests in the kahawai stocks, current use estimates of kahawai for both the commercial and non-commercial sector are not the best available information upon which to base decisions for TACs and TACCs, and non-commercial allowances in the six QMAs of the kahawai fishery.

**3.33** The Minister's 2004 decisions applied the policy of the second respondent MFish that once a fish species has entered the QMS, the

proportion of catch allocation between the commercial and non-commercial fishing sectors is in practice fixed.

- 3.34 The Minister's 2004 decisions to base the TACs for each QMA on current catch use estimates has resulted in close to half (48%) of the overall TAC being allocated to the smallest QMA by size, which is KAH1.

#### ***Events Post the Minister's 2004 decisions***

- 3.35 Subsequently, the Minister received further advice from MFish and on or about 13 December 2004 and decided to make no change to recreational daily bag limit controls for the 2004/2005 years but to keep the position under review.
- 3.36 Neither the Minister nor the second respondent has implemented an overall 15% reduction in current use estimates for the commercial and non-commercial fishing sectors in accordance with the Minister's 2004 decisions of 10 August 2004.
- 3.37 On 8 July 2005, the Minister issued a media statement in which he signalled a new approach to the kahawai species.

#### **Particulars**

The media statement stated *inter alia* that:

"... an Initial Position Paper (IPP) for Kahawai contains two alternative options for consideration – the status quo, or a rebuild strategy.

These choices are underpinned by two quite difference approaches to the management of shared fisheries, "he told the conference. "The conservative no change option could be described as maintaining the status quo.

"The other option is underpinned by a new policy idea – that species important to recreational fishers should be managed above, or even significantly above, what fisheries documents refer to as BMSY – the size of the fish stock that delivers the maximum sustainable yield."

... this new approach would effectively give greater recognition of recreational fishing values.

"It would acknowledge that one size doesn't fit all. For the recreational sector abundance of stock, a corresponding increased catch rate, or ability to catch larger fish, might be more important than extracting the maximum sustainable yield.

...

under either Kahawai options, no additional recreational controls are contemplated: "There is no evidence before me, that the recreational sector is catching the allowance assigned to it. This issue will need to be monitored on an on-going basis."

***MFish Advice to Minister for 2005 Decisions***

**3.38** Also on 8 July 2005, the second respondent and officials of MFish released a new Initial Position Paper entitled “Review of Sustainability Measures and Other Management Controls for Kahawai for the 2005-06 (1 October) Fishing Year” (IPP 2005).

**3.39** In IPP 2005 MFish stated *inter alia* at paragraph 7 that:

- m) A consideration for this fishery would be to adopt a specific management objective for managing the stock above  $B_{MSY}$ . MFish notes that both commercial and non-commercial submissions supported this concept in 2004. There is currently insufficient information to specify a target stock size or the catch levels necessary to achieve any particular target level.
- n) The Minister can take the following matters into account when reviewing the TAC:
  - uncertainty in information on status of kahawai stocks;
  - anecdotal information on decline in abundance from some non-commercial fishers;
  - value of the fishery to recreational and commercial users;
  - desire to provide a greater level of certainty that the stock biomass will at least maintain its current level and preferably provide for an increase in biomass;
  - socio-economic information including the potential impacts and benefits to all sectors; and
  - availability of new information to support a stock assessment of kahawai in 2007.
- o) There are two options proposed in this review. The first is to maintain the status quo TACs allowances and TACCs pending new scientific information to support a change. This option assumes that current catch limits will at least maintain and preferably provide for an increase in the kahawai biomass. The second option is to reduce TACs to take account of the uncertain information surrounding the status of kahawai stocks and achieve greater probability that these will increase pending a future reassessment of stock status. Adopting any option to reduce TACs would require that the decrease be based on nominal percentage reduction.
- p) Should the Minister decide to reduce TAC and allowances there is no proposal to apply additional management controls to further constrain recreational catch. Recreational fishers consider the catch will be within the current allowance without additional management controls. There is no new information to suggest that revised recreational allowance would be exceeded with current management controls and at current levels of abundance.

**3.40** The plaintiffs rely upon the full contents of IPP 2005 as if the same were set out in extenso herein.

**3.41** MFish received submissions and information from fishing sector interests on the IPP 2005 for the kahawai stocks:

- a. In favouring retention of the status quo, commercial fishing interests submitted (*inter alia*) that;

- i. Property rights in the form of quota were being adversely affected by lack of management of the recreational fishing sector;
  - ii. Alteration of the TACC without commensurate control upon fishing by the recreational sector has the effect of reallocating fishing sector shares within particular fisheries and raises the issue of claims for compensation from the Crown for lost property rights.
- b. Recreational fishing interests including RFC and NZBGFC submitted (*inter alia*) that:
- i. The Minister's 2004 kahawai decisions, which were made in error, should not be the baseline from which the 2005 decisions will be made;
  - ii. That kahawai stocks be managed above the level required to produce the maximum sustainable yield,  $B_{MSY}$ ;
  - iii. That the Minister not allocate proportionally between the commercial and non-commercial sectors;
  - iv. That the Minister re-evaluate the true nature and scope of non-commercial fishing interests in kahawai before making TAC and TACC decisions in each quota management area;
  - v. That there are strong sustainability concerns in the Hauraki Marine Park area requiring a rebuild within KAH1 to recognise an area of national importance;
  - vi. That in allowing for non-commercial interests a return to reasonable catch rates and fish size was required.

3.42 The IPP 2005 was followed by the release on or about 14 September 2005 of a new Final Position Paper entitled "Review of Sustainability Measures and Other Management Controls for Kahawai for the 2005-06 (01 October) Fishing Year" (FAP 2005) which gave the Ministry's final advice to the Minister prior to the Minister's 2005 decisions. The plaintiffs rely on the full contents of FAP 2005 as if the same were set out in extenso herein.

- 3.43 The FAP 2005 contained MFish's advice for two options for the setting of TACs, allowances and TACCs in the kahawai fishery being to either:
- a. Retain the status quo for the TACs, allowances and TACCs for each quota management area, with no change made to recreational bag limits, pending the availability of further information on the recreational take (option 1); or
  - b. An arbitrary 10% reduction of all TACs and a proportional reduction of customary and recreational allowances and of TACCs within each TAC and each quota management area to fit within each reduced TAC (option 2).
- 3.44 The FAP 2005 also contains MFish's advice and discussion of submissions made by the recreational fishing sector and by the commercial fishing sector concerning:
- a. General statutory obligations and policy guidelines;
  - b. Management of recreational and customary catch;
  - c. Approach to localised sustainability issues;
  - d. Management above  $B_{MSY}$ ;
  - e. Precautionary Approach;
  - f. Use of Anecdotal Information;
  - g. Consideration of the Purpose and Principles of the Act; and
  - h. Compliance Plans.

### ***The Minister's 2005 Decisions***

- 3.45 On or about 28 September 2005, the Minister made statutory powers of decision under the Act for kahawai stocks by:
- a. Setting a total allowable catch ("TAC") for each quota management area;
  - b. Allowing for non-commercial interests in the kahawai stock in each quota management area, these interests being:
    - (i) Maori customary non-commercial fishing interests; and
    - (iii) Recreational interests;



- c. Allowing for other sources of fishing related mortality for each quota management area;
  - d. Determining to make no change to the recreational bag limits, pending the availability of further information on the recreational take;
  - e. Setting a total allowable commercial catch (“TACC”) for commercial fishing sector for each quota management area (collectively referred to as “the Minister's 2005 decisions”).
- 3.46 For the purposes of the Minister's 2005 decisions, the Minister adopted option 2 from FAP 2005 and in relation to quota management areas KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10 determined to set TACs, TACCs, and non-commercial allowances at a 10% proportional reduction from the levels in the Minister's 2004 decisions.

***The Minister’s 2005 Decisions Letter***

- 3.47 The Minister's 2005 decisions are recorded in writing in a letter dated 22 November 2005 sent to all stakeholders interested in the kahawai fishery including the plaintiffs (“the Minister's 2005 decisions letter”). The letter from the Minister is relied upon as if the same were set out in extenso herein. Material parts of the Minister's 2005 decisions letter contain the following statements:

The previous Minister agreed earlier this year to review the TACs for kahawai for the 2005-06 fishing year. The IPP proposed to either retain the TACs at existing levels, or to reduce TACs by 10%. The large response to these proposals made it clear that management of our kahawai fisheries remains an important issue for all sectors.

The Minister considered the issue of the management target for kahawai. Kahawai is a key fishery for the non-commercial sector and is significant for parts of the commercial sector. The Act provides considerable discretion over the target levels for fisheries. The Minister signalled the Labour Party policy on managing important shared fisheries above  $B_{MSY}$  - I intend to seek advice from MFish on implementation of this policy during the coming year.

Regardless of any determination to manage kahawai above  $B_{MSY}$ , the Minister believed there was sufficient concern to warrant reconsideration of existing TACs to provide an acceptable level of certainty that kahawai stocks will remain at current levels or increased in size. Information on recent trends in kahawai stock abundance is conflicting. Submissions were also in conflict over the current status of the stock. Non-commercial fishers considered the stock had declined significantly, remained below desired levels of abundance, and would likely not increase with any certainty or as rapidly as they would

like under the TACs that were set in 2004. The commercial sector considered there was no evidence of stock decline and no basis for a reduction to removals.

The last stock assessment for kahawai was undertaken in 1997. Given the age of the stock assessment the Minister believes there is considerable uncertainty over stock status and estimates of sustainable yield. Given this uncertainty and the importance of the fishery he took a risk adverse approach to management of this species.

He was not satisfied that the current TAC provides sufficient certainty of maintaining or improving current biomass. Therefore, after carefully considering the merits of each option and the issues raised in submissions, he decided to reduce TACs for all kahawai stocks by 10%. This decision provides more certainty that kahawai stocks will remain at current levels or increase in size.

He also decided to proportionally reduce all allowances and TACCs to fit within each TAC. The Minister's decision on TACs, TACCs and allowances for all kahawai stocks are set out below.

<b>Stock</b>	<b>TAC (tonnes)</b>	<b>Customary allowance (tonnes)</b>	<b>Recreational allowance (tonnes)</b>	<b>Other sources of fishing- related mortality (tonnes)</b>	<b>TACC (tonnes)</b>
KAH 1	3315	495	1680	65	1075
KAH 2	1530	185	610	30	705
KAH 3	935	115	390	20	410
KAH 4	14	1	4	0	9
KAH 8	1040	115	385	20	520
KAH 10	14	1	4	9	9

In making the decision the Minister was aware the required reduction in commercial and noncommercial catches to fit within the new TACs will have socio-economic impacts. He carefully considered the balance between measures designed to provide more certainty of maintaining or increasing the biomass, and the socio-economic impact. On balance he considered the 10% reduction to the TAC and proportional change to the TACC and allowances best meets his concerns regarding risk to the stock while mitigating socio-economic impact.

There has been no change to recreational bag limits for kahawai since the Minister's 2004 decisions on catch limits and allowances. Monitoring the recreational catch of kahawai to determine whether it remains within the revised allowances set for the fishery will be a matter of priority. If monitoring indicates that the allowance is being exceeded then management measures will be implemented to ensure the positive effect of the TAC reductions is not compromised.

New stock assessment information on kahawai will be available in 2007. It is intended that the TACs for this species be reviewed again at that time to ensure the management framework is operating as intended.

### **Implementation of the Minister's 2005 decisions**

- 3.48 The Minister's 2005 decisions have been implemented by the second respondent or the second respondent's agents *inter alia* by:
- a. Giving the required notices in the Gazette, namely, the Fisheries (Total Allowable Catch) Notice 2005 and the Fisheries (Total Allowable Commercial Catch) Notice 2005; and
  - b. Notifying every quota holder affected by the reduction of total allowable commercial catch in accordance with section 22 of the Act.

### **Effects of the Minister's 2005 decisions**

- 3.49 In determining the non-commercial (recreational and customary Maori) allowances, the Minister did not set such allowances before or prior to setting the TACC for each kahawai stock in the relevant individual QMAs, that is to say for KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10.
- 3.50 The Minister's 2005 decisions adopted MFish advice presented as option 2 in FAP 2005 and were, in effect, decisions to base the management of the kahawai fishery under the Act (being decisions for TACs, TACCs and non-commercial allowances) on the Minister's 2004 decisions, being decisions based on current fishing sector use estimates (or a proportion of that use) based on recent catch levels or estimates of recent catch levels.
- 3.51 The Minister's 2005 decisions, being based upon the contents of the FAP 2005, and the Minister's 2004 decisions are:
- a. Arbitrary, in that a further 10% reduction was applied across all QMA's;
  - b. Inconsistent with the Minister's 2004 decisions in circumstances where little further information was available, and being made within one year of introduction of the kahawai stocks to the quota management system;
  - c. Demonstrate the problems and errors concerning the Minister's 2004 decisions.

- 3.52 As a result of the Minister's 2005 decisions being based upon the Minister's 2004 decisions, the Minister's 2005 decisions are flawed and in error in the respects pleaded below.

### ***Statutory Powers of Decision***

- 3.53 The Minister's 2004 and 2005 decisions in setting TACs, TACCs and non-commercial allowances constitute statutory powers of decision pursuant *inter alia* to sections 13, 20 and 21 of the Act affecting the rights and interests of the plaintiffs and of all recreational fishers and fishing interests in New Zealand.
- 3.54 The Minister's 2004 and 2005 decisions adversely affect recreational fishing interests in the kahawai stock, particularly in KAH1, and the recognition of the Hauraki Gulf and its natural resources as a matter of national significance.

### **Grounds for Review**

#### **4. The decisions to set TACs**

##### **Errors of law**

- 4.1 The plaintiffs repeat the allegations contained in paragraphs 1 to 3.54 herein.
- 4.2 The Minister's 2004 and 2005 decisions to set the TACs in respect of each quota management area relating to the kahawai stocks in such QMAs pursuant to the statutory power in section 13 of the Act contained errors of law.

##### **Particulars**

The plaintiffs provide particulars of such errors of law as follows:

- a. The Minister misinterpreted the information principles in section 10 of the Act and solely applied current use estimates for the recreational and commercial sectors (without having regard to available information as to catch rate levels on a daily basis, and other information of availability for each kahawai stock in the various QMAs) such that current use estimates do not constitute the "best available information" about each stock, including the current sustainability of each stock, when making initial decisions

setting TACs at or above maximum sustainable yield for the kahawai biomass (“ $B_{MSY}$ ”) for the purposes of the Act.

- b. The Minister misapplied the information principles in section 10 of the Act by:
  - (ii) failing to take into account and/or based the decisions to set TACs on the best information available; and/or
  - (iii) failing to be cautious when information was uncertain, unreliable or inadequate; and/or
  - (iv) failing to apply properly or at all the precautionary principles mandated by international laws, treaties and conventions; and/or
  - (v) failing to apply the principles set out in the MFish paper entitled “Section 10: Information Principles”.
- c. The Minister's 2004 and 2005 decisions based the TACs for each QMA solely on catch history or estimates of current sector use of the fishery, contrary to:
  - (i) the purpose of the Act which provides for the utilisation of fisheries resources while ensuring sustainability in each stock; and/or
  - (ii) the principles of sustainability and ensuring sustainability as defined in sections 2, 8(2) and 11 of the Act.
- d. The Minister's 2004 and 2005 decisions setting the TACs adopted a national approach and calculated an estimate of the MSY for total kahawai stocks in all six QMAs, without evaluating the sustainability of kahawai stocks and the particular, differing factors relevant to ensuring sustainability within each individual QMA.

- 4.3 The Minister's 2004 and 2005 decisions to set the TACs for the kahawai stock in quota management area KAH 1 contained errors of law in that the Minister failed to have regard to the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. As a result of the above errors of law, the purported decisions of the Minister to set TACs for the six QMAs of the kahawai fishery are invalid and of no effect.

**Failing to Take Into Account Relevant Considerations/ Taking into Account Irrelevant Considerations**

- 4.4 The plaintiffs repeat the allegations contained in paragraphs 1 to 4.3 above.
- 4.5 The Minister's 2004 and 2005 decisions to set TACs in respect of each quota management area relating to the kahawai stocks failed to consider relevant considerations.

**Particulars**

- a. Enabling recreational fishers to provide for their social, economic, and cultural wellbeing in accordance with the purpose of the Act;
  - b. The social, cultural and economic factors relevant to recreational fishers in setting initial TACs based on estimates of current use (or a proportion of current use);
  - c. Maintaining the potential of the kahawai fishery resources to meet the reasonably foreseeable needs of future generations;
  - d. Avoiding, remedying, or mitigation of any adverse effects of fishing on the aquatic environment;
  - e. The principles of ensuring sustainability of the kahawai fishery stocks generally;
  - f. The provisions of and principles contained in sections 7 and 8 of the Hauraki Gulf Marine Park Act;
  - g. The specific requirements and features for TAC setting purposes of the individual QMAs, particularly KAH1;
  - h. The matters relevant to the setting of TACs for each QMA pleaded in paragraph 3.23(i) to (iv) inclusive;
  - i. Changes in the distribution of purse seine fishing effort;
  - j. The relative size of QMAs; and
  - k. Direct observation by experienced recreational and customary fishers.
- 4.6 The Minister's 2004 and 2005 decisions to set TACs in respect of each quota management area relating to the kahawai stocks took into account irrelevant considerations.

### **Particulars**

- a. A proportionate reduction of commercial and non-commercial sector catch entitlement.
- b. A highly uncertain and out of date preliminary stock assessment.

4.7 The Minister's 2005 decisions setting the TACs for kahawai in respect of each QMA were based on the Minister's 2004 decisions and, by incorporation, are therefore subject to the same or any errors of law, failure to take into account relevant considerations, the taking into account of irrelevant considerations as affected the Minister's 2004 decisions as pleaded herein.

### **Wherefore the plaintiffs seek:**

- a. An order in the nature of certiorari quashing and/or setting aside the purported 2005 and 2005 decisions of the Minister to set the TACs in KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10 ; and
- b. An order quashing the references to Kahawai and the TACs for KAH1, KAH 2, KAH3, KAH4, KAH8 and KAH10 in the Schedule to the Fisheries (Total Allowable Catch) Notice 2004, and in the schedule to the Fisheries (Total Allowable Catch) Notice 2005; and
- c. An order directing the Minister to reconsider and redetermine the decisions setting TACs under section 13 of the Act; and
- d. Orders giving directions pursuant to section 4(5) of the Judicature Amendment Act 1972 as to (i) the applicable legal principles to be applied by the Minister in such reconsideration and redetermination and/or (ii) the relevant matters to be considered by the Minister in such reconsideration and redetermination; and
- e. Such further and/or alternative direction as the Court thinks fit; and
- f. Costs.

## **5. The decisions to allow for non-commercial and recreational interests**

### **Errors of law**

5.1 The plaintiffs repeat the allegations contained in paragraphs 1 to 4.7 above.

- 5.2 The Minister's 2004 and 2005 decisions allow for non-commercial fishing interests in respect of each quota management area relating to kahawai stocks in such QMAs pursuant to the statutory power in section 20 of the Act contained errors of law.
- 5.3 The Minister's 2004 and 2005 decisions in allowing for Maori customary non-commercial fishing interests and recreational fishing interests in each quota management area were flawed and contained errors of law in that non-commercial fishing interests were not properly allowed for as required by section 21(1) of the Act in that the Minister:

#### **Particulars**

- a. Misinterpreted the statutory requirements of section 21(1) of the Act particularly the meaning of "non-commercial fishing interests";
- b. Misinterpreted the information principles in section 10 of the Act by solely applying current use estimates for the recreational and commercial sectors (without having regard to available information as to catch rate levels on a daily basis, and other information of availability and size of kahawai in each of the QMAs) such that current use estimates do not constitute the "best available information" when making initial decisions setting TACCs and non-commercial fishing interests in the various QMAs;
- c. The Minister misapplied the information principles in section 10 of the Act by:
  - (i) failing to take into account and/or based the decisions to set TACs on the best information available; and/or
  - (ii) failing to be cautious when information was uncertain, unreliable or inadequate; and/or
  - (iii) failing to apply properly or at all the precautionary principles mandated by international laws, treaties and conventions; and/or
  - (iv) failing to apply the principles set out in the MFish paper entitled "Section 10: Information Principles".



- d. Did not properly allow for non-commercial fishing interests prior to or before the setting of the TACCs for each QMA;
  - e. Based non-commercial fishing interests solely on estimates of catch history or current use estimates instead of allowing for the true nature and scope of non-commercial fishing interests;
  - f. Erred in equating non-commercial fishing interests with a tonnage allocation for each QMA;
  - g. Erred in determining a reduction in the non-commercial fishing allowance proportionate to a reduction in commercial catch;
  - h. Wrongly equated non-commercial fishing interests with estimates of current catch or use therefore subordinating non-commercial fishing interests to commercial fishing interests.
- 5.4 The Minister's 2004 and 2005 decisions setting the non-commercial and recreational allowances for the QMA KAH1 contained a further error of law in that the Minister failed to have particular regard to the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000.

**Failing to Take Into Account Relevant Considerations/ Taking into Account Irrelevant Considerations**

- 5.5 The Minister's 2004 and 2005 decisions allow for non-commercial interests under section 21 failed to consider relevant considerations:

**Particulars**

- a. The available information as to the history of the kahawai fishery and the effect to recreational fishing interest of the delayed introduction of kahawai into the QMS;
- b. Available information concerning low daily catch rates for recreational fishers;
- c. The true nature and scope of recreational fishing interests;
- d. The effect of commercial fishing on the current recreational sector catch;
- e. The varied nature of recreational fishing interests e.g. shore based fishers and boat based fishers;

- f. Available information as to the quality of recreational fishing in each QMA, including by reasonable measures of non-commercial fishing interests, catch per unit of effort, and fish size data;
- g. The matters relevant to the setting of TACCs;
- h. The matters relating to non-commercial allowances pleaded in paragraph 3.23(i) to (vii) inclusive;
- i. Allowing for recreational interests in kahawai stocks the best available information is not limited to estimates of current use;
- j. Assessment of recreational fishing interests based reasonable measures of non-commercial fishing interests which include:
  - Fish size;
  - Time taken to catch fish;
  - Historic reliance;
  - Other measures of trends in fish availability, in each QMA;
  - The relative value of kahawai to each sector.
  - The rationale for pre QMS management measures;
  - Indications of the effectiveness of pre QMS management;
  - Evidence of regional depletion;
  - The relative size of QMAs;
  - The distribution of fishing effort (and fishing method) across QMAs;
  - Direct observations of experienced fishers;
  - The relationship of kahawai to other non-commercial fish stocks.

5.6 The Minister's 2004 and 2005 decisions allow for non-commercial and recreational interests under section 21 took into account irrelevant considerations:

### Particulars

- a. Commercial fishing interests;

### Errors of Fact

- 5.7 The Minister's 2004 and 2005 decisions allow for non-commercial interests under section 21 were based on mistakes of fact.

### Particulars

- a. The Minister determined that estimates of current use (based on catch history) was the best available information of non-commercial fishers' reliance on kahawai and/or interest in the kahawai fishery;
  - b. The Minister's 2004 and 2005 decisions that abundance levels may have declined, whereas in fact abundance has declined.
- 5.8 The Minister's 2005 decisions to allow for non-commercial and recreational interests in respect of each QMA for kahawai were based on the Minister's 2004 decisions and, by incorporation, are therefore subject to the same or any errors of law, errors of fact, failure to take into account relevant considerations, and the taking into account of irrelevant considerations as affected the Minister's 2004 decisions as pleaded herein.

### Wherefore the plaintiffs seek:

- a. A declaration that the decisions to set the non-commercial and recreational allowances in KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10 are invalid and of no effect; and
- b. An order in the nature of certiorari quashing and/or setting aside the decision to set the recreational allowances in KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10; and
- c. An order quashing the references to Kahawai and the TACCs for KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10 in the Schedule to the Fisheries (Total Allowable Commercial Catch) Notice 2004, and in the schedule to the Fisheries (Total Allowable Commercial Catch) Notice 2005; and
- d. An order directing the Minister to reconsider and redetermine the decisions setting non-commercial and recreational allowances under sections 20 and 21 of the Act; and

- e. Orders giving directions pursuant to section 4(5) of the Judicature Amendment Act 1972 as to (i) the proper legal principles to be applied by the Minister in such reconsideration and redetermination and (ii) the matters relevant to be considered by the Minister; and
- f. Such further and/or alternative directions as the Court thinks fit; and
- g. Costs.

## 6. The decisions to set the TACCs

### Errors of law

- 6.1 The plaintiffs repeat the allegations contained in paragraphs 1 to 5.8.
- 6.2 As a consequence of the errors of fact and law in paragraph 5.1 and 5.8. above in failing properly allow for non-commercial interests under section 21, the Minister's 2004 and 2005 decisions to set TACCs under section 20 were invalid and of no effect.

### Particulars

- a. The Minister misapplied the information principles in section 10 of the Act by:
  - (i) failing to take into account and/or based the decisions to set TACCs on the best information available; and/or
  - (ii) failing to be cautious when information was uncertain, unreliable or inadequate; and/or
  - (iii) failing to apply properly or at all the precautionary principles mandated by international laws, treaties and conventions; and/or
  - (iv) failing to apply the principles set out in the MFish paper entitled "Section 10: Information Principles".
- b. The Minister's 2004 and 2005 decisions based the initial TACCs for each QMA solely on catch history or estimates of current sector use of the fishery, contrary to:
  - (i) the purpose of the Act which provides for the utilisation of fisheries resources while ensuring sustainability in each stock; and/or

(ii) the principles of sustainability and ensuring sustainability as defined in sections 2, 8(2) and 11 of the Act.

c. The Minister's 2004 and 2005 decisions setting TACCs for the QMA KAH1 failed to have particular regard to the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000.

d. The Minister's 2004 and 2005 decisions setting TACCs were in error as a consequence of the same errors of law pleaded in paragraph 5.3 which are further relied upon in relation to the decisions setting TACCs.

e. The Minister made other errors of fact and law as pleaded in paragraphs 5.4 to 5.8 which are further relied upon.

6.3 The Minister's 2005 decisions to set the TACCs in respect of each QMA for kahawai were based on the Minister's 2004 decisions and, by incorporation, are therefore subject to the same or any errors of law, errors of fact, failure to take into account relevant considerations, and the taking into account of irrelevant considerations as affected the Minister's 2004 decisions as pleaded herein.

**Wherefore the plaintiffs seek:**

- a. A declaration that the Minister's 2004 and 2005 decisions on kahawai TACCs are invalid and of no effect; and
- b. An order in the nature of certiorari quashing and/or setting aside the Minister's 2004 and 2005 decisions to set the TACCs in KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10; and
- c. An order quashing the references to Kahawai and the TACCs for KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10 in the Schedule to the Fisheries (Total Allowable Commercial Catch) Notice 2004, and in the Schedule to the Fisheries (Total Allowable Commercial Catch) Notice 2004; and
- d. An order directing the Minister to reconsider and redetermine the Minister's 2004 and 2005 decisions setting non-commercial and recreational allowances under sections 20 and 21 of the Act; and
- e. Orders giving directions pursuant to section 4(5) of the Judicature Amendment Act 1972 as to (i) the proper legal principles to be applied by the Minister in such reconsideration and redetermination and (ii) the matters both relevant and irrelevant to be considered by the Minister.

- f. Such further and/or alternative directions as the Court thinks fit;
- g. Costs.

This document is filed by **STUART JAMES RYAN**, Solicitor for the abovenamed Plaintiffs, of the firm of Hesketh Henry. The address for service of the abovenamed Plaintiffs is at the offices of Hesketh Henry, Lawyers, Level 11, 41 Shortland Street, Auckland 1.

Documents for service on the abovenamed Plaintiffs may be left at that address for service or may be:

- a. Posted to the solicitor at Hesketh Henry, Private Bag 92093, Auckland;  
or
- b. Left for the solicitor at a document exchange for direction to document exchange box no. CP 24017, Auckland; or
- c. Transmitted to the solicitor by facsimile to (09) 3094-494.